

**THE STATE OF SOUTH CAROLINA**  
In The Court of Appeals

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Appeal from Horry County  
Benjamin H. Culbertson, Judge

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Case No. 2012-212373

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Jane RM Doe, Respondent

v.

Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia  
Consultants, Cardiology and Arrhythmias Consultant,  
Institute of Electrophysiology, P.C.

Of whom Omar Jaraki and Halla Jaraki are the Appellants

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**FINAL REPLY BRIEF OF APPELLANTS**

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**ATTORNEY FOR APPELLANTS**

## TABLE OF CONTENTS

Table of Authorities . . . . .	3
Argument . . . . .	4
Synopsis of Reply . . . . .	4
Discussion . . . . .	5
Conclusion . . . . .	9

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE</b>
<i>Bowers v. Bowers</i> , 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App. 1991)	5
<i>McClurg v. Deaton</i> , 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2009)	8
<i>McMaster v. Columbia Bd. Of Zoning Appeals</i> , 395 S.C. 499, 719 S.E.2d 660 (2011)	7
<i>Rodriguez v. Gutierrez</i> , 391 S.C. 323, 705 S.E.2d 94 (Ct.App. 2011)	5

**OTHER AUTHORITIES**

S.C.R.C.P. 7 . . . . .	4
S.C.R.C.P. 55 . . . . .	4
S.C.R.C.P. 60 . . . . .	4
S.C.R.C.P. 52 . . . . .	6

## ARGUMENT

The trial Court committed error and abused its discretion when it ruled that the letter Appellant's sent seeking additional information about the identity of the plaintiff did not constitute an answer pursuant to S.C.R.C.P. 7 or otherwise defend pursuant to S.C.R.C.P. 55, or constitute "good cause" and ultimately excusable neglect under Rule 60. (Questions I and II).

Appellants would respectfully submit that the respondent has misperceived the nature of the argument being made in this appeal. Appellants assert that aspects of Rules 7, 55, and the concept of "good cause" should properly go into the decision making process of whether *excusable neglect* has been shown pursuant to S.C.R.C.P. 60. We argue that the foregoing concepts should be taken into consideration when making a determination of excusable neglect. **R. 123, lines 12-15.**

### Synopsis of Reply

Default judgment is the end of a continuous timeline from the service of the complaint. The judgment includes the failure to timely answer or to otherwise defend the action. It includes the notation of default by the clerk of court. And it ends with the entry of default judgment by the Court. The default judgment, therefore, is not divorced from the notions of "an answer" as contemplated by Rule 7, or "good cause" and "default" as those concepts are contemplated by Rule 55. The phrase "good cause" as used in Appellants' question number "II" is used as a stepping stone to the Rule 60 analysis of excusable neglect. Thus, we argue that the correspondence presented by Appellants in response to the service of the complaint, and the initials "RM" as used by the Respondent in the case caption, gave rise to the presence of "good cause" as contemplated by Rule 55.

due to confusion. Had the Appellants had the opportunity to argue *good cause* at the initial default stage prior to the entry of the default judgment, they could likely have persuaded the court to grant relief. No facts changed with the entry of default judgment. The letters were still part of the case; and the initials “RM” were still in the case caption. Appellants argue that these facts cannot be divorced from the timeline of events which gave rise to the entry of the default judgment as opposed to the entry of default.

Appellants have argued that all of the foregoing elements are present in this case and they combine together to satisfy the requirements of Rule 60 and its “excusable neglect” element. Just as Appellants argued concepts from Rules 7 and 55 in Question I, they have argued *good cause* in Question II as being part of, and combining to meet, the requisite showing of excusable neglect required by Rule 60.

We are aware that *good cause* is the standard which must be met when seeking relief from default under Rule 55. Likewise, we are aware that a showing of *excusable neglect* is one of the requirements for obtaining relief from default judgment under Rule 60. See Brief of Appellants at pages 13 – 14, citing *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App. 1991); and *Rodriguez v. Gutierrez*, 391 S.C. 323, 705 S.E.2d 94 (Ct.App. 2011).

### Discussion

Appellants Omar and Halla Jaraki were served on February 26, 2010, and March 5, 2010, respectively. Dr. Jaraki sent his letter to plaintiff’s counsel on March 24, 2010, which was within the thirty (30) day window required for a timely response<sup>1</sup>. Thirty days thereafter, plaintiff’s counsel filed the notice of motion and motion for default judgment and an entry of default was entered on April 30<sup>th</sup>, 2010, by the Clerk of Court. **R. 132.**

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<sup>1</sup> These letters were filed with the Clerk’s office on April 1, 2010.

Regarding respondent's argument that the issue is not preserved, See Brief of Respondent at page 6, Appellants would respectfully suggest that the argument presented in the Appellants' brief has again been misperceived. This is a *Rule 60* motion case addressing the concept of "excusable neglect." However, our analysis of this issue encompasses the preceding steps in the process which led to the point of the entry of the actual judgment. It incorporates considerations of Rules 7, 55, and the concept of "good cause" and how those rules could or should impact or reflect upon the decision making process relative to the concept of "excusable neglect." We are not addressing procedural rules with respect to their own application, but we are attempting to build an example of excusable neglect by combining what transpired in this case prior to the entry of the default judgment.

A default judgment had been entered in this case *before* the motion for relief had been filed. Rule 52 in its purest form addresses factual findings and conclusions of law based thereon. It establishes a framework whereupon a party may challenge a trial court's omission of issues(s) argued at trial but left unaddressed by the final judgment.<sup>2</sup> However, subsection (e) of Rule 52 eliminates the need for specific findings of fact and conclusions of law in a Rule 12 motion setting. S.C.R.C.P. 52(e) states, "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or

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<sup>2</sup> Rule 52 states in its pertinent part, "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58.... Sub section "b" addresses "Amendment." The rule states, "Upon motion of a party *made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly, and the motion may be made with a timely motion for a new trial.* Emphasis added.

any other motion except as provided in Rule 41(b).”

Appellants’ case is in the nature of a Rule 12 issue because in their letter to plaintiff’s counsel before the default was ever entered by the Clerk of Court, they were asking for a more definite statement, to wit: the name of the plaintiff and other pertinent identifying information. To raise the issue at that time under Rule 52, however, Appellants were required to make their motion within 10 days of the entry of the judgment. They missed that deadline which would have run on May 10, 2012, and therefore the applicability of Rule 52, and such a motion, becomes irrelevant to the matter at hand in terms of preservation of the issue for appellate review. Respondent cites no authority for its interpretation of this aspect of Rule 52. The case of *McMaster v. Columbia Bd. Of Zoning Appeals*, 395 S.C. 499, 719 S.E.2d 660 (2011) at note 3, cited by Respondent, certainly doesn’t address Rule 52. It was a Rule 59 case pure and simple which merely confirmed the procedural necessity of making a motion to point out that the trial court didn’t address a specific defense in its final order that might have been pled in the case (equal protection and privacy challenges to the Ordinance in that instance) for appellate review to be had of that issue. 395 S.C. 499, 508.

Appellants are asserting here that considerations presented by Rules 7, 55, and “good cause” for relief under Rule 55, may and should in this case, affect a trial court’s consideration of whether “excusable neglect” has been shown by Appellants under Rule 60. Perhaps not in their own right do the letters sent by Appellants to Respondent’s counsel constitute a formal answer, but it is reasonable to assert that the letters do properly belong in a chain of events which are designed to “otherwise defend” the allegations made in this case by plaintiff “RM.” We argue that the letters should be part

of the determination of whether “excusable neglect” has been shown by the Appellants in this case and the trial Court was wrong to hold otherwise.

That brings us to Respondent’s argument that Appellants did not preserve the issue for review because they didn’t file a motion pursuant to Rule 59. We submit that Rule 59 may have application with respect to a reconsideration of the order denying relief from default judgment under Rule 60 only. Cf *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2009)<sup>3</sup> To the extent Respondent’s argument can be construed contrary to this conclusion, we submit respectfully, counsel for respondent is in error.

Thus Appellants present an S.C.R.C.P. 60 case. When Appellants filed their motion for relief, it was based on S.C.R.C.P. 60(b). The motion read in pertinent part, “Said motion is based on the grounds enumerated in S.C.R.C.P. 60(b)(1) including mistake, inadvertence, surprise, or excusable neglect.” At the motion hearing, counsel for Appellants argued,

[the letter] was a – an answer, a responsive pleading that was filed basically denying the allegations in the complaint and the complaint goes back really and complains of inappropriate touching . . . . That was denied by Dr. Jaraki and we would submit that it would squarely fall, that the facts of this case within the scope of Rule 60 and warrant relief from the default judgment in this case....

**R. 124, lines 10 - 18.**

Appellants were arguing that the letters they filed were a responsive pleading,

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<sup>3</sup> In *McClurg v. Deaton*, supra, Deaton moved to set aside the default judgment pursuant to Rules 60(b)(1) and 60(b)(3) of the South Carolina Rules of Civil Procedure. New Prime filed a motion to intervene and likewise moved to set aside the judgment pursuant to Rules 60(b)(1) and 60(b)(3). The trial court granted New Prime's motion to intervene, but denied both New Prime's and Deaton's motions to set aside the default judgment. Both New Prime and Deaton made motions for reconsideration pursuant to Rule 59(e), SCRCPP, which the trial judge denied with the exception of deleting some language from the order not at issue in the appeal. 380 S.C. at 569.

and that they were otherwise defending the action, that they were seeking a more definite statement, that they constituted good cause - - all at the same time. Appellants were asserting that this series of events constituted more than *good cause* under Rule 55, and thus, simultaneously under the facts of this case, constituted excusable neglect under Rule 60.

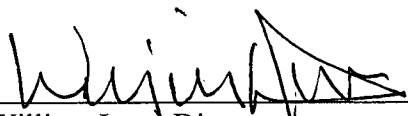
Appellants did not neglect this action. They affirmatively sought to determine the identity of the plaintiff and upon hiring counsel, filed answers which directly denied the accusations contained in the complaint. **R. 27.** This case, and the nature of the allegations contained in the complaint, demand to be tried on the merits of the matter.

**CONCLUSION**

For the foregoing reasons the Appellants' request for relief from default judgment should be granted. The trial court's ruling failing to find excusable neglect should properly be reversed and the case remanded and Appellants be permitted to file their proposed responsive pleadings.

Respectfully submitted,

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**ATTORNEYS FOR THE APPELLANTS**

This 14 day of December, 2012  
Myrtle Beach, South Carolina

**THE STATE OF SOUTH CAROLINA**  
In The Court of Appeals

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Appeal from Horry County  
Benjamin H. Culbertson, Judge

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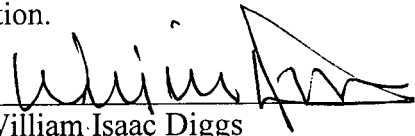
Of whom Omar Jaraki and Halla Jaraki are the Appellants

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**CERTIFICATE OF COUNSEL**

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This is to certify that the Final Reply Brief of Appellant complies with the requirements Rule 211(b), SCACR. Additionally, counsel certifies that the Final Brief of Appellant is in compliance with the Supreme Court's August 13, 2007 order regarding personal data identifiers and sensitive information.

  
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This 14 day of December, 2012  
Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM Horry COUNTY  
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Institute of Electrophysiology, P.C.,

*Of Whom* Omar Jaraki and Halla Jaraki, are

Appellants

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SC Court of Appeals

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**CERTIFICATE OF SERVICE**

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This is to certify that I have this 20th day of December, 2012, deposited one copy of the Final Brief and Final Reply Brief of Appellants in the U.S. Postal Service with proper postage affixed thereto and addressed to opposing counsel as follows:

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